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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1538

JAMES PLYLER, SUPERINTENDENT OF THE TYLER INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellants,
vs.
J. AND R. DOE, AS GUARDIANS AD LITEM FOR I. DOE, ET AL.,
Plaintiffs-Appellees

BRIEF OF AMICUS CURIAE CALIFORNIA STATE BOARD OF EDUCATION IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST

The State Board of Education of the State of California has specific constitutional and statutory responsibilities for the administration of the public school system of California. With over 4.5 million pupils in 1,043 districts, the California system of public instruction is the largest in the country.

Like the State of Texas, California is a border state with large numbers of immigrant children. During the

1979–80 school year, approximately 930,000 children in California were of Mexican descent; approximately 288,000 had limited or no English Language proficiency [1] and an estimated 40,000 of our children were not, in the language of the Texas statute, "legally admitted aliens." [2] California has more illegal alien children attending its public schools than does Texas.

Unlike Texas, however, California does not have a statute like Section 21.031 of the Texas Education Code.[3] On the contrary, California has two statutes, Education

[1] California Education Code, Section 52161.

[2] The testimony of Marion Houstoun on pp. 76–79 of the December transcript indicates that about one-half of the undocumented Mexican aliens in the United States live in California and about one-fourth of such aliens live in Texas. The number of undocumented alien children of school age living in Texas was found to be approximately 20,000 (*In re Alien Children Education Litigation* (1980), 501 F. Supp. 544 at 577). Assuming the ratio of school-age children to total population of undocumented aliens is constant between the two states, California would have about 40,000 school age children who are undocumented aliens.

[3] Section 21.031 of the Texas Education Code, the constitutionality of which is at issue herein, provides as follows:

"(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

"(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

"(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district."

Code Sections 48200 and 48400, which require all pupils between the ages of 6 and 18 to attend school in the district in which they reside. All pupils attending school are included in the statutory formula for generating local and state funds. There is no distinction in California law between alien children and children who are citizens or between those alien children who have immigration status and those who do not.

Because the California State Board of Education oversees generally the education of children described by the Texas statute here in question, and because of the number of children involved is even greater in California than in Texas, it believes that it has a point of view which this Court may find helpful.

STATEMENT OF POSITION

There have been many constitutional and fiscal arguments advanced to the District Court, the Court of Appeals for the Fifth Circuit and to this Court by the parties and, undoubtedly, by other amici. Included within this issue is the threshold question of whether the constitutionality of the Texas statute is to be measured by the "strict scrutiny" test or by the more lenient "rational basis" test.

Counsel for the children (Appellees herein) have argued quite persuasively that this Court should employ the "strict scrutiny" standard, both because the statute, in its wording and its effect, classifies pupils on a suspect basis—alienage—and because education is a "fundamental interest" of the children that is being adversely

affected (as a practical matter denied) by the statute.

Amicus does not wish to undermine the thrust of this argument. On the contrary, we believe that both the District Court [4] and the Court of Appeals for the Fifth Circuit [5] correctly concluded that the "strict scrutiny" test applied and that the Texas statute failed to meet that test.

However, it is the position of the California State Board of Education that the statute must fall even if the "rational basis" test is utilized because the statute does not rationally advance any legitimate state interest.

ARGUMENT

THERE IS NO LEGITIMATE STATE INTEREST IN DEPRIVING UNDOCUMENTED ALIEN CHILDREN OF ACCESS TO A PUBLIC EDUCATION

There can be no doubt that education is among the most important services provided by our society in terms of its impact on and importance to the individual and its impact on and importance to society as a whole.

The California Supreme Court has correctly characterized the crucial role which education plays to society and its members (*Serrano* v. *Priest,* 5 Cal. 3d 584; 96 Cal. Rptr. 601; 487 P. 2d 1241 (1971). Although the following quotation from the *Serrano* decision is rather lengthy, it is set forth here because of its relevance to the instant issue:

"We, therefore, begin by examining the indispen-

[4] 458 F. Supp. 569 (1978).
[5] 628 F. 2d 448 (1980).

"sable role which education plays in the modern industrial state. This role, we believe, has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life. '[T]he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable.' (Note, *Development in the Law—Equal Protection* (1969) 82 Harv.L.Rev. 1065, 1129.) Thus, education is the lifeline of both the individual and society.

"The fundamental importance of education has been recognized in other contexts by the United States Supreme Court and by this court. These decisions—while not *legally* controlling on the exact issue before us—are persuasive in their accurate factual description of the significance of learning.[23]

"The classic expression of this position came in *Brown* v. *Board of Education* (1954) 347 U.S. 483 [98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R.2d 1180], which invalidated de jure segregation by race in public schools. The high court declared: 'Today, education is perhaps the most important function of state and

[23] Defendants contend that these cases are not of precedential value because they do not consider education in the context of wealth discrimination, but merely in the context of racial segregation or total exclusion from school. We recognize this distinction, but cannot agree with defendants' conclusion. Our quotation of these cases is not intended to suggest that they *control* the legal result which we reach here, but simply that they eloquently express the crucial importance of education.

"local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.' (*Id.* at p. 493 [98 L.Ed. at p. 880].)

"The twin themes of the importance of education to the individual and to society have recurred in numerous decisions of this court. Most recently in *San Francisco Unified School Dist.* v. *Johnson, supra,* 3 Cal.3d 937, where we considered the validity of an anti-busing statute, we observed, '[u]nequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society.' (*Id.* at p. 950.) Similarly, in *Jackson* v. *Pasadena City School Dist., supra,* 59 Cal.2d 876, which raised a claim that school districts had been gerrymandered to avoid integration, this court said: 'In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis.' (*Id.* at p. 880.)

"When children living in remote areas brought an action to compel local school authorities to furnish

"them bus transportation to class, we stated: 'We indulge in no hyperbole to assert that society has a compelling interest in affording children an opportunity to attend school. This was evidenced more than three centuries ago, when Massachusetts provided the first public school system in 1647. [Citation.] And today an education has become the *sine qua non* of useful existence. . . . In light of the public interest in conserving the resource of young minds, we must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education.' (Fn. omitted.) (*Manjares* v. *Newton* (1966) 64 Cal.2d 365, 375–376 [49 Cal.Rptr. 805, 411 P.2d 901].)

"And long before these last mentioned cases, in *Piper* v. *Big Pine School Dist., supra,* 193 Cal. 664, where an Indian girl sought to attend state public schools, we declared: '[T]he common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his school work. These are rights and privileges that cannot be denied.' (*Id.* at p. 673; see also *Ward* v. *Flood* (1874) 48 Cal. 36.) Although *Manjares* and *Piper* involved actual exclusion from the public schools, surely the right to an education today means more than access to a classroom.[24] (See *Horowitz & Neitring, supra,*

[24] Cf. *Reynolds* v. *Sims* (1964) 377 U.S. 533, 562–563 [12 L.Ed.2d 506, 527–528, 84 S.Ct. 1362], where the Supreme Court asserted that the right to vote is impaired not only when a qualified individual is barred from voting, but also when the impact of his ballot is diminished by unequal electoral apportionment: 'It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been en-

"15 U.C.L.A. L.Rev. 787, 811.)

"It is illuminating to compare in importance the right to an education with the rights of defendants in criminal cases and the right to vote—two 'fundamental interests' which the Supreme Court has already protected against discrimination based on wealth. Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer. '[E]ducation not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which—to the state—have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society—participation, communication, and social mobility, to name but a few.' (Fn. omitted.) (Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. 305, 362–363.)

"The analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is

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tirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. . . . Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. . . . One must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.' [Citation.]" (Fn. omitted.)

" 'preservative of other basic civil and political rights. . . . (*Reynolds* v. *Sims, supra,* 377 U.S. 533, 562 [12 L.Ed.2d 506, 527]; see *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356, 370 [30 L.Ed. 220, 226, 6 S.Ct. 1064].) The drafters of the California Constitution used this same rationale—indeed, almost identical language—in expressing the importance of education. Article IX, section 1 provides: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.' (See also *Piper* v. *Big Pine School Dist., supra,* 193 Cal. 664, 668.) At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.

"The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. The public school has been termed 'the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most pervasive means for promoting our common destiny.' (*McCollum* v. *Board of Education* (1948) 333 U.S. 203, 216, 231 [92 L.Ed. 649, 661, 669, 68 S.Ct. 461, 2 A.L.R.2d 1338] (Frankfurter, J., concurring).) In *Abington School Dist.* v. *Schempp* (1963) 374 U.S. 203 [10 L.Ed.2d 844, 83 S.Ct. 1560], it was said that 'Americans regard

" 'public schools as a most vital civic institution for the preservation of a democratic system of government.' (*Id.* at p. 230 [10 L.Ed.2d at p. 863] (Brennan, J., concurring).)[25]

"We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'[26]

"First, education is essential in maintaining what several commentators have termed 'free enterprise

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"[25] The sensitive interplay between education and the cherished First Amendment right of free speech has also received recognition by the United States Supreme Court. In *Shelton* v. *Tucker* (1960) 364 U.S. 479 [5 L.Ed.2d 231, 81 S.Ct. 247], the court declared: 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' (*Id.* at p. 487 [5 L.Ed.2d at p. 236].) Similarly, the court observed in *Keyishian* v. *Board of Regents* (1967) 385 U.S. 589 [17 L.Ed.2d 629, 87 S.Ct. 675], 'The classroom is peculiarly the "market place of ideas." The Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas. . . .' (*Id.* at p. 603 [17 L.Ed.2d at p. 640].) (See also *Tinker* v. *Des Moines School Dist.* (1969) 393 U.S. 503, 512 [21 L.Ed.2d 731, 741, 89 S.Ct. 733]; *Epperson* v. *Arkansas* (1968) 393 U.S. 97 [21 L.Ed.2d 228, 89 S.Ct. 266].)

"[26] The uniqueness of education was recently stressed by the United States Supreme Court in *Palmer* v. *Thompson* (1971) 403 U.S. 217 [29 L.Ed.2d 438, 91 S.Ct. 1940], where the court upheld the right of Jackson, Mississippi to close its municipal swimming pools rather than operate them on an integrated basis. Distinguishing an earlier Supreme Court decision which refused to permit the closing of schools to avoid desegregation, the court stated: 'Of course that case did not involve swimming pools but rather public schools, an enterprise we have described as "perhaps the most important function of state and local governments." *Brown* v. *Board of Education, supra,* at 493.' (*Id.* at p. 221 [29 L.Ed.2d at p. 442], fn. 6.) This theme was echoed in the concurring opinion of Justice Blackmun, who wrote: 'The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities.' (*Id.* at p. 229 [29 L.Ed.2d at p. 447].)

" 'democracy'—that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. Accordingly, the public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of American society.[27]

"Second, education is universally relevant. 'Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education . . . .' (Fn. omitted.) (Coons, Clune & Sugarman, *supra,* 57 Cal.L.Rev. at p. 388.)

"Third, public education continues over a lengthy period of life—between 10 and 13 years. Few other government services have such sustained, intensive contact with the recipient.

"Fourth, education is unmatched in the extent to

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[27] In this context, we find persuasive the following passage from *Hobson* v. *Hansen, supra,* 269 F.Supp. 401, which held, inter alia, that higher per-pupil expenditures in predominantly white schools than in black schools in the District of Columbia deprived 'the District's Negro and poor public school children of their right to equal educational opportunity with the District's white and more affluent public school children.' (*Id.* at p. 406.)

"'If the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects (e.g., unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in *de facto* segregation in public schools irresistibly calls for additional justification. What supports this call is . . . the degree to which the poor and the Negro must rely on the public schools in rescuing themselves from their depressed cultural and economic condition . . . .' (*Id.* at p. 508.) Although we realize that the instant case does not present the racial aspects present in *Hobson,* we find compelling that decision's assessment of the important social role of the public schools.

"which it molds the personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state. (Coons, Clune & Sugarman, *supra,* 57 Cal.L.Rev. at p. 389.) '[T]he influence of the school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological make-up.' (*Hobson* v. *Hansen, supra,* 269 F. Supp. 401, 483.)

"Finally, education is so important that the state has made it compulsory—not only in the requirement of attendance but also by assignment to a particular district and school. Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent. In this context, it has been suggested that 'a child of the poor assigned willy-nilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years.' (Coons, Clune Sugarman, *supra,* 57 Cal.L.Rev. at p. 388.)"

Although this court has not held that education is a fundamental interest under the United States Constitution,[6] the importance of education to our people has been recognized in a number of contexts. For example, the long line of decisions ordering school integration under the Fourteenth Amendment has been predicated

[6] See, e.g., *San Antonio Independent School District* v. *Rodriquez* (1973) 411 U.S. 1; 93 S.Ct. 1278; 36 L.Ed.2d 16.

upon *Brown* v. *Board of Education, supra.*

In addition, this court in *Lau* v. *Nichols,* 414 U.S. 563, held discriminatory an educational program which deprived students who did not speak English of a meaningful opportunity to participate.

The discrimination against children in this case is even more pronounced than the discrimination forbidden by this court in *Brown* and *Lau.* In those cases, the plaintiff children were receiving some semblance of an education. They were not, however, receiving an educational opportunity that was equal to that provided other children. In this matter the plaintiff children are effectively denied any kind of an education at all.

When one reads the factors that make education important, one feature is obvious: *there can be no rational distinction in the importance of education to the individual that distinguishes one individual from another.*

The State of Texas might attempt to justify its exclusion of alien children on one or more of several grounds as follows:

(1) Illegal alien children, unlike children with immigration status, are not likely to remain in the state and are, therefore, unworthy of significant support.

(2) Illegal aliens, even when they remain in the state, do not contribute to society and should, therefore, be precluded from receiving its benefits.

(3) The provision of a free education to alien children will encourage children and their parents to enter this country illegally.

The responses to the above possible grounds are fairly

obvious and are as follows:

(1) The factual bases for the assumptions have not been demonstrated, and

(2) Even if the factual bases are true, they do not constitute reasonable cause for excluding alien children from educational opportunities.

There is really no credible evidence to suggest that illegal alien children are more likely or less likely to remain in the state than anyone else. Moreover, even if it could be demonstrated as a matter of fact that children of illegal alien parents are more transient than children of parents who are legal aliens or citizens, such would not constitute grounds for excluding children from school. There are many groups of children (such as children of parents engaged in migrant agricultural work and children of parents who are members of the armed forces) who are known to have a high degree of transiency, particularly in terms of public school attendance. It has never been suggested that eligibility for school attendance should be based upon a lack of transiency.

Similarly, it has not been demonstrated as a factual matter than illegal aliens contribute more per person or less per person than other people who are citizens or legal aliens. On the contrary, it should be obvious that any person who resides and works in a community will contribute as much to that society in terms of taxes as any other person earning the same family income. Illegal aliens pay the same amount of sales tax on a purchase as anyone else. If they own property, they pay property

taxes to the same extent as anyone else on property of a similar value. If they rent property, the landlord will pay the same degree of taxes and will pay those taxes through rents obtained from the tenant. Clearly, the amount of taxes paid by a person to the state or federal government depends upon the income of that person or his or her family and does not depend at all on the person's immigration status. Moreover, it has never been suggested that children of rich parents are entitled to a better education than their less wealthy neighbor merely because the latter child's parent contributes more in taxes. On the contrary, a hallmark of the public school system since its early beginnings has been the availability of equal educational opportunities to children without regard to their individual wealth.

There is no evidence at all to suggest that availability of a free education is a significant motivation for the illegal entry of aliens into this country or any particular state. On the contrary, it should be clear that alien children enter this country because their parents come here for reasons of economics and the availability of work rather than for educational reasons.

In the last analysis, the Texas statute is not justifiable on educational grounds; it is a desire by the state to save money. While we understand the pressure of declining fiscal resources for education, this fiscal justification for the statute must also fail, for two reasons.

First, the need to conserve resources has never been held to justify invidious discrimination against particular groups. While the educational opportunities for all stu-

dents may be reduced equally, distinctions based on race, sex and national origin are impermissible.

Second, while we admit that education is an expense to the state, there also are costs to the state for the care, confinement, and services to persons who are unable to function well in our society. There is an inverse relationship between the degree of education enjoyed by a person and his or her dependency on welfare and other social services and his or her involvement with the criminal justice system. It has never been demonstrated that education is more expensive than ignorance.

CONCLUSION

As educators concerned with the provision of quality education for all children and for the improvement of society through an educated population, the California State Board of Education believes strongly that there is no rational educational or fiscal purpose in excluding children of illegal aliens from receiving the educational opportunities available to all other children. For this reason, we believe that the decision below should be affirmed.

Dated, Sacramento, California, September 27, 1981.

Respectfully submitted,

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